IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 497 of 2004
With
CRIMINAL MISC.APPLICATION No. 10026 of 2006
In CRIMINAL APPEAL No. 497 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MR.JUSTICE K.A.PUJ

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

BALVANTGIRI @ BALIO CHHANGIRI GOSAI - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

==========

Appearance :
MR RAJESH M AGRAWAL for Appellant
MR RC KODEKAR ADDL.PUBLIC PROSECUTOR for Respondent

==========

CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 29/09/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

1. By instant appeal under section 374 of the Code of Criminal Procedure ('the Code' for short), the appellant ('the accused' for short) seeks to challenge the judgment and order dated 13.2.2004 rendered in Sessions Case No. 66 of 2001 by the learned Additional Sessions Judge, 3rd Fast Track Court, Gondal, District Rajkot, by which the accused has been convicted for the offence under section 20 (b) (ii) (B) of the Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001 ('Amended NDPS Act,2001' for short) and sentenced him to suffer RI for ten years and to pay fine of Rs.1 lakh and, in default of payment of fine, SI for further period of two years.

2. Briefly stated, the prosecution case, is as under:

2.1. On 27.7.2001, S.U. Pande, Police Inspector, Jetpur City Police Station, received an information that the accused, who was also earlier arrested for possessing ganja, was to pass on National Highway No.8-B, Opp. Sadguru Dyeing, with quantity of ganja. On receipt of this information, services of two panchas were requisitioned and a raid was arranged. The accused, who was coming from Sativav, was sighted by the members of the raiding party, who had maintained a vigil near Sadguru Dyeing. On seeing the police, an attempt was made by the accused to run away, but, after chasing him, he was arrested. When the accused was asked whether he would like to be searched in presence of a Magistrate or a Gazetted Officer, he said that he does not want to be searched in presence of any of them. It was found that the accused was carrying a large tin-pot. On search of the tin-

pot, 2 Kg. and 800 grams ganja was found. On demand, the accused could not produce pass or permit authorising him to possess ganja. Thereafter a panchnama was prepared on the place of the incident. The Ganja was seized and all the procedures were followed and the accused was brought to Jetpur City Police Station where he was handed over to the PSO. FIR was lodged against the accused for commission of offence under section 20 (b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act, 1985' for short). Thereafter further investigation was handed over to PSI GD Rajput. He sent the muddamal for chemical analysis to FSL. At the end of the investigation, since incriminating evidence was found against the accused and the report received from FSL was to the effect that the muddamal article sent for chemical analysis was proved to be Ganja, the accused was charge-sheeted in the Court of the learned Chief Judicial Magistrate, Gondal.

2.2. As the offence under NDPS Act, 1985 is

exclusively triable by the Court of Sessions, the learned Chief Judicial Magistrate, Gondal committed the case to the Court of Sessions, Gondal.

2.3. The learned Additional sessions Judge, 3rd Fast Track Court, Gondal, to whom the case was made over for trial, framed the charge against the accused for commission of the offence under section 20 (b) of the NDPS Act, 1985, which was read over and explained to him. As the accused pleaded not guilty to the charge and claimed to be tried, he was put to trial in Sessions Case No.66 of 2001.

2.4. In order to prove the culpability of the accused, the prosecution has examined in all 10 witnesses and relied upon their oral testimonies, details of which have been given in para 4 of the impugned judgment and order.

2.5. In order to bring home the charge levelled against the accused, the prosecution has produced

a number of documents and relied upon the contents of the same, details of which are enumerated in para 5 of the impugned judgment and order.

2.6. After recording of the evidence of the prosecution witnesses was over, the learned Additional Sessions Judge explained to the accused the circumstances appearing against him in the evidence of the prosecution witnesses and recorded his further statement under Section 313 of the Code. In his further statement he denied the case of the prosecution in toto. He has stated that he has been falsely implicated in the case. However, in support of his defence, he has neither produced any evidence nor examined any witness.

2.7. On appreciation, evaluation, analysis and scrutiny of the evidence adduced by the prosecution, the trial court held that it is proved by the prosecution beyond reasonable doubt that on 27.7.2001 when the accused was

intercepted on National Highway No.8-B, from him 2.Kg. 800 grams of Ganja was seized for which he was not possessing any licence or permit. The trial court has also held that mandatory provisions of the NDPS Act, 1985 were complied with and there was no possibility of sample being tampered with before it was sent to FSL for chemical analysis. On the basis of the aforesaid finding, the trial court recorded the finding that the complicity of the accused is proved and accordingly he was convicted for the offence under section 20 (b) (ii) (B) of the Amended NDPS Act, 2001 and sentenced him to suffer RI for ten years and to pay fine of Rs.1 lakh and, in default of payment of fine, SI for further two years, giving rise to instant appeal at the instance of the accused, from jail.

3. Mr. R.M. Agrawal, learned advocate of the accused, has contended that he is not challenging the judgment and order of conviction on merits but he is challenging only the sentence imposed upon the accused. According to him, the offence

has been committed on 27.7.2001 when the NDPS Act, 1985 before amendment in 2001 was holding the field. NDPS Act, 1985 was amended in 2001 with effect from 2.10.2001. Under section 8 (b) of the NDPS Act, 1985, cultivation or possession of opium poppy or any cannabis plant was prohibited and any contravention would invite the punishable prescribed under section 20 (b) (i) of the NDPS Act, 1985. For any contravention to this Section is punishable with RI for a term which may extend to five years and shall also be liable to fine which may extend to fifty thousand rupees whereas as per Amended NDPS Act, 2001 which came into effect from 2.10.2001, cultivation or possession of cannabis plant and cannabis is punishable under section 20 (b) (ii) (B) with RI for ten years and fine of Rs.1 lakh.

It is further submitted by Mr. Agrawal, learned advocate of the accused, that Section-41 of the Amended NDPS Act, 2001 provides that any person found guilty of any offence punishable under the NDPS Act, 1985, as it stood immediately

before such commencement, shall be liable for punishment which is lesser than the punishment for which he is otherwise liable at the date of the commission of such offence. Thus, on 27.7.2001, when the offence was committed, it was punishable with imprisonment for 5 years. The provisions of the Amended NDPS Act, 2001 would not be applicable and hence under no circumstance the accused could have been convicted for any term longer than the term of 5 years. It is, therefore, submitted by him that the punishment imposed by the trial court on the accused as per the Amended NDPS Act, 2001 does not stand to scrutiny and the trial court ought to have punished the accused as per the NDPS Act, 1985 wherein the maximum punishment prescribed for this offence is imprisonment for five years and fine of Rs.50,000/- Therefore, according to him, the impugned judgment and order sentencing the accused for RI for ten years and fine of Rs.1 lakh deserves to be quashed and set aside and he may be sentenced to suffer imprisonment for a period of five years. He, therefore, urged to

allow this appeal and to modify the impugned judgment and order passed by the trial court and accordingly he may be convicted for the offence punishable under Section 20 (b) (i) of the NDPS Act, 1985 and sentenced accordingly.

4. Mr.R.C.Kodekar, learned Additional Public Prosecutor, on the other hand, submitted that during the course of investigation and trial the Amended NDPS Act, 2001 was very much in force and the date on which the Session Case was decided by the trial court, the Amended NDPS Act, 2001 was in force and hence the punishment of RI for 10 years is rightly imposed by the trial court and no interference is called for, especially when the accused has not pressed his ground challenging the conviction.

5. To appreciate the controversy raised before the Court, it is worthwhile to have a close look at the relevant provisions of the NDPS Act, 1985. Section-8 prohibits certain operations. Sub Section-(b) of Section-8 says that no person

shall cultivate the opium poppy or cannabis plant. Section-20 of the NDPS Act,1985 imposed punishment for contravention in relation to cannabis plant and cannabis.

Section-20(a)(i) prior to its amendment with effect from October, 2001 reads as under :-

"Section-20(a)(i) – Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder,-

(a) cultivates any cannabis plant; or

(b) .....

shall be punishable.

(i) Where such contravention relates to ganja or the cultivation of cannabis plant, with rigorous imprisonment for a term which may extend to five years and shall also be liable to fine which may extend to fifty thousand rupees.

(ii).....

Provided that the Court may, for reasons to

be recorded in the judgment, impose a fine exceeding two lakh rupees."

By virtue of the Narcotic Drugs and Psychotropic Substances (Amendment) Act 2001, Section-20(a)(i) is amended and after its amendment, it reads as under:-

"Section-20(a)(i) – Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder:-

(a) cultivates any cannabis plant; or

(b) .....

shall be punishable.

(i) where such contravention relates to clause (a) with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine which may extend to one lakh rupees; and

(ii).....

Provided that the Court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees."

6. Section-41 of the Amended NDPS Act, 2001

deals with application of the said Act to pending cases. Sub Section-1 of Section-41 of the Amended NDPS Act, 2001 reads as under:-

> *"Sub Section-1 of Section-41 – Notwithstanding anything contained in sub-section (2) of Section 1, all cases pending before the Courts or under investigation at the commencement of this Act shall be disposed of in accordance with the provisions of the principal Act as amended by this Act and accordingly, any person found guilty of any offence punishable under the principal Act, as it stood immediately before such commencement, shall be liable for a punishment which is lesser than the punishment for which he is otherwise liable at the date of the commission of such offence;*
>
> *Provided that nothing in this section shall apply to cases pending in appeal."*

7. In the case of **Basheer alias N.P.Basheer vs.**

State of Kerala, reported in (2004) 3 Supreme Court Cases 609 the interpretation of Section 41 (1) of the Amended NDPS Act, 2001 has come up for consideration before the Supreme Court. In the said case the Supreme Court has observed that by this section, Parliament has declared its intention to apply the amended provisions of the Act to: (a) all cases pending before the court on 2.10.2001; (b) all cases under investigation as on that date; and provides that these categories of cases shall be disposed of in accordance with the provisions of the NDPS Act, 1985 as amended by the Amended NDPS Act, 2001. In other words, the benefit of the rationalised sentencing structure would be applicable to these categories. The proviso, however, makes an exception and excludes the application of the rationalised sentencing structure to cases pending in appeal. The Court further observed in para-12 of the judgment that all statues must be interpreted as prospective in operation, unless retrospectivity is expressly declared by the statute or to be inferred as the necessary

intendment from the language used in the statute. As far as the amendments introduced in the NDPS Act, 1985, by Act 9 of 2001 are concerned, Section-41, in term, says that the amending Act would apply to all cases pending before the court or under investigation on the date of commencement of the amending Act. In other words, it is to be applied retrospectively. If the Act had contained any provisions to the detriment of the accused, then undoubtedly, it would have been hit by the rule against post facto legislation contained in Article 20(1). However, the court found that the amendments (at least the ones rationalising the sentencing structure) are more beneficial to the accused and amount to mollification of the rigour of the law. Consequently, despite retrospectivity they ought to be applied to the cases pending before the Court or even to cases pending investigation on the date on which the amending Act came into force. Such application would not be hit by Article 20(1) of the Constitution.

8. From the aforesaid observations made by the Supreme Court, it is clear that the Supreme Court was mainly concerned in that case with rationalisation of the sentence structure. The controversy which arises before this Court in the present appeal was not there before the Supreme Court. However, the observations which have been made to the effect that if the Act had contained any provisions to the detriment of the accused, then undoubtedly, it would have been hit by the rule against post facto legislation contained in Article 20(1), would certainly help the present accused and it would be a guiding factor to resolve this controversy. The Court was also mindful of the fact that the amendment in the form of rationalising the sentencing structure is more beneficial to the accused and amount to mollification of the rigour of the law. However, if on the basis of this amendment a person who has committed the offence prior to this amendment, subjecting him conviction and sentence of 5 years and whose offence was investigated and tried after the said amendment shall not be made

him liable to the enhanced sentence of 10 years instead of 5 years, as it would certainly hit by rules against post facto legislation contained under Article-20(1) of the Constitution of India.

9. At this stage, it would be advantageous to refer to Article-20(1) which reads as under :-

> *"Article-20(1) No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.*

10. Prohibitions imposed by Article-20 are directly relevant to the criminal process. Clause (1) is concerned with the substantive law of criminal liability and penalty. Later portion of this article clearly reveals that no person shall be subjected to penalty greater than that which might have been inflicted under the law in

force at the time of the commission of the offence. The offence admittedly committed on 27.7.2001. On that date, old provisions are in force and for commission of such offence, the accused was liable to be sentenced for imprisonment of 5 years and fine of rupees fifty thousand and in default thereof S.I of 6 months. If the amending provisions are made applicable to the case of the accused, in that case the accused would be liable to be sentenced for R.I of 10 years with fine of Rs.1 lakh and in default thereof S.I of 2 years. This should not be the intention of the legislature and it would hit by the rule against post facto legislation contained in Article-20(1) of the Constitution of India.

11. It is true that the above contention has not been raised before the trial Court and the trial Court had no occasion to deal with the said contention. However, this being a question of law and since no new facts are required to be investigated and there is no dispute about the fact that the offence was committed on 27.7.2001,

we are of the view that the sentence of R.I of 10 years with fine of Rs.1 lakh and in default thereof S.I of 2 years is not at all justified. The accused should have been sentenced only for R.I of 5 years with fine of rupees fifty thousand and in default thereof S.I of 6 months.

12. For the foregoing reasons, the appeal is partly allowed. The impugned judgment and order dated 13.2.2004 rendered in Sessions Case No.66 of 2001 by the learned Additional Sessions Judge, 3rd Fast Track Court, Gondal, District Rajkot by which the accused has been convicted for the offence punishable under section 20 (b) (ii) (B) of the Amended NDPS Act, 2001 and sentencing him to suffer RI for ten years and to pay fine of Rs.1 lakh and in default of payment of fine, S.I. for further period of two years, is quashed and set aside and instead of that the accused is convicted for commission of the offence punishable under section 20 (b) (i) of the NDPS Act, 1985 and sentenced to suffer RI for five years and to pay fine of Rs.50,000/- and in

default of payment of fine, to undergo S.I. for six months more.

Since Criminal Appeal No.497 of 2004 is partly allowed, Criminal Misc. Application No. 10026 of 2006 filed by the accused praying to release him on bail during pendency of the appeal is disposed of as it is not pressed by Mr. RM Agrawal, learned advocate of the accused.

(A.M. Kapadia, J.)

(K.A. Puj, J.)

...

(karan)